Filed 4/15/19 In re Davlene R. CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re DAVLENE R., a Person Coming Under the Juvenile Court Law.	B290982 (Los Angeles County Super. Ct. No. CK75002)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. FRANCES E., Defendant and Appellant.	

APPEAL from orders of the Superior Court of Los Angeles County, Rashida A. Adams, Judge. Affirmed.

Michelle L. Jarvis, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel, and Sally Son, Deputy County Counsel, for Plaintiff and Respondent.

Frances E., the mother of 11-year-old Davlene R., appeals the denial of her petition to modify prior juvenile court orders to permit her to have visitation with Davlene or, in the alternative, to order conjoint therapy for Frances and Davlene (Welf. & Inst. Code, § 388)[1] and the court's subsequent order terminating parental rights to Davlene and identifying adoption as Davlene's permanent plan (§ 366.26). Frances contends the juvenile court abused its discretion in denying her section 388 petition because she had demonstrated her circumstances had changed and it would be in Davlene's best interest to have visitation or conjoint counseling. She also argues the order terminating parental rights violated due process because it was not properly based on a predicate finding of parental unfitness. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Removal of Frances's Youngest Child, the Probate Court-ordered Guardianship of Davlene, and Frances's Acquiescence in Her Other Children Living with Their Fathers*

In October 2008 the Los Angeles County Department of Children and Family Services (Department) filed a dependency petition on behalf of Isaiah R., Frances's infant son and the

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[1] Statutory references are to this code.

youngest of her six children, alleging the child had tested positive for methamphetamine at birth. The petition was sustained; Isaiah was removed from Frances's custody; and reunification services were offered to Frances. In June 2009 the juvenile court found that Frances had not made significant progress in resolving the substance abuse issues that led to Isaiah's removal and that she had not demonstrated the ability to complete the objectives of the treatment plan necessary to provide for Isaiah's safety. Family reunification services were ended, and Frances's parental rights were terminated. Isaiah was adopted in September 2011.

In April 2009, while the dependency proceedings concerning Isaiah were pending, the probate court granted legal guardianship of Davlene, then only 22 months old, to Rachelle R. According to Frances, she had requested Rachelle's assistance in caring for Davlene when Davlene was an infant because Frances was a transient at the time. Frances claims Rachelle obtained the order for legal guardianship without Frances's knowledge or consent and thereafter refused to allow Frances consistent contact or visitation with Davlene.

Between 2009 and 2012 Frances had criminal convictions for possession of burglary tools, being under the influence of a controlled substance, unlawfully taking or driving a vehicle, felony receipt of stolen property, petty theft, possession of drug paraphernalia and unlawfully carrying a loaded firearm. During this period, with Frances's consent, each of her four oldest children went to live with their respective biological fathers.

2. *Removal of Davlene from Her Legal Guardian*

In May 2016 the Department learned that Rachelle was living in a drug house and had previously been arrested for

possession of a controlled substance. On June 1, 2016 the Department filed a petition on behalf of Davlene, alleging that Rachelle had left her with Rachelle's sister Roxanne for two weeks without making an appropriate plan for the child's ongoing care. The juvenile court found a prima facie showing had been made that Davlene was a person described by section 300, subdivision (b), and that a substantial danger existed to her physical and/or mental health without removal from the custody of her legal guardian. Davlene was detained and placed with Roxanne.

On July 29, 2016 the Department filed an amended petition adding allegations that Frances had an unresolved 25-year history of substance abuse, had previously failed to participate in a court-ordered substance abuse program and drug testing and had failed to reunify with Davlene's sibling, Isaiah, due to her substance abuse. The amended petition also included allegations describing Davlene's father's extensive criminal history.

By the time of the initial jurisdiction hearing on August 11, 2016, Frances had again been arrested on drug-related charges and was in custody. At the hearing Frances requested visitation with Davlene once she was released. The court, advised that Davlene did not know that Frances was her mother, ordered that no visitation occur until Davlene was made aware of the circumstances and her counsel and therapists approved. Visits were to be monitored in a therapeutic setting once a week when they began.

At the continued jurisdiction/disposition hearing on September 14, 2016, the court sustained the petition against Rachelle, declared Davlene a dependent child of the court and removed her from Rachelle's care. The allegations against

Frances and Davlene's father were dismissed without prejudice. The court ordered the Department to provide Rachelle with reunification services but found that visitation with her, as well as with Frances, would be detrimental to the child. Nonetheless, the court indicated it wanted visitation between Davlene and her biological parents to occur when appropriate and directed Davlene's therapist to recommend how to proceed. Davlene continued to live with Roxanne.

At a status hearing on January 10, 2017 the court reaffirmed its finding that visitation with the legal guardian or Davlene's biological parents would be detrimental to Davlene.

3. *The Six- and 12-month Review Hearings*

Rachelle, Frances and Davlene's father all requested visitation with Davlene at the six-month review hearing. Davlene's counsel objected, stating visitation would be detrimental to the child and explaining Davlene was frightened of Rachelle and had no relationship with her biological parents. Forcing the child to visit with them, counsel continued, would cause Davlene emotional distress. While noting that visitation was the norm, the court agreed, under the unusual circumstances of this case, visitation would not be in the child's best interest.

The court terminated Rachelle's reunification services at the 12-month review hearing on October 31, 2017. The Department asked the court to set a selection and implementation hearing pursuant to section 366.26 since the guardianship was still in place, but indicated it intended to file a new petition concerning Frances and Davlene's father once the guardianship was terminated. The section 366.26 hearing was scheduled for February 27, 2018.

4. *Frances's Section 388 Petition*

Frances on January 4, 2018 petitioned the court pursuant to section 388 to modify its August 11, 2016 order, as reiterated on January 10, 2017, denying her any visitation with Davlene and asked the court to order visitation or, in the alternative, conjoint therapy with Davlene. The petition stated Frances had participated in numerous programs to address her past substance abuse problem and averred that she had been sober and had maintained a stable lifestyle for the past 17 months. Frances argued that, because the legal guardianship would soon be terminated, it would be in Davlene's best interest to reestablish a relationship with her biological mother. Frances attached a number of certificates and supporting documents to the petition, including photographs of her together with Davlene to contradict the misimpression that she had no prior relationship with the child.

In its response to the section 388 petition the Department stated that, since being placed in Roxanne's care, Davlene had never expressed any desire to visit with Frances and was not even willing to speak to Roxanne or social workers about her biological parents.

Frances testified at a hearing on the section 388 petition in May 2018, explaining she had an on-and-off relationship with Davlene because Rachelle had not allowed her to see the child. Frances told the court she wanted her daughter placed with her, but thought it would be best to have counseling first so they could build a relationship.

Davlene's counsel asked the court to deny the petition, arguing Frances had a long history of drug use and incarceration and had only recently begun steps to a sober life. In addition,

Davlene had been unequivocal about her desire not to have contact with Frances and her wish to stay with Roxanne with whom she had lived for nearly 10 years.

The court denied the petition, finding that Frances had only showed "changing," not "changed," conditions and that she had not demonstrated the requested order would be in Davlene's best interest.

5. *The Section 366.26 Hearing*

Davlene, testifying in chambers at the section 366.26 hearing on June 26, 2018, said she enjoyed living with Roxanne and wanted to be adopted by her, and she did not want to live with Frances because she did not know her. (Indeed, Davlene said she knew who her biological mother was, but had forgotten her name. She did not remember anything about her, including the last time she saw her.) She also told the court she did not want to visit with Frances or other members of the maternal family.

Argument at the hearing focused on the need for a finding by clear and convincing evidence that it would be detrimental to place Davlene with Frances. Frances's counsel insisted the finding must be based on her current circumstances, not past issues or problems, and noted Frances was now stable and sober.

The court found by clear and convincing evidence it would be detrimental to return Davlene to live with Frances. The court explained, although it had not made a finding of detriment at the jurisdiction and disposition hearings in September 2016, it could have done so based on the evidence then before it. The court found the detriment remained: While there had been changes in Frances's circumstances, her issues as identified at that time had not been completely resolved. The court also found Davlene's

testimony regarding her lack of relationship with Frances to be credible and persuasive.

The court found Davlene was adoptable and no exception to adoption applied. It terminated the parental rights of Frances and Davlene's father, and the child's care, custody and control were transferred to the Department for adoptive planning and placement.[2] Roxanne was designated as the prospective adoptive parent.

DISCUSSION

1. *The Juvenile Court Did Not Abuse Its Discretion in Denying Frances's Petition To Modify Prior Court Orders*

a. *Section 388 and the standard of review*

Section 388 provides for modification of juvenile court orders when the moving party (1) presents new evidence or a change of circumstance and (2) demonstrates modification of the previous order is in the child's best interest.[3] (*In re Jasmon O.* (1994) 8 Cal.4th 398, 415; *In re Stephanie M.* (1994) 7 Cal.4th 295, 317; *In re Y.M.* (2012) 207 Cal.App.4th 892, 919; see Cal. Rules of Court, rule 5.570(e); see also *In re Zacharia D.* (1993) 6 Cal.4th 435, 455 ["'[s]ection 388 provides the "escape

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[2] The court maintained the legal guardianship in place, to terminate by operation of law once Davlene's adoption was finalized.

[3] Section 388, subdivision (a)(1), provides, "Any parent or other person having an interest in a child who is a dependent of the juvenile court . . . may, upon grounds of change of circumstance or new evidence, petition the court in the same action in which the child was found to be a dependent child . . . for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court."

mechanism" that . . . must be built into the process to allow the court to consider new information"'].)

"[B]est interests is a complex idea" that requires consideration of a variety of factors. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 531; see *In re Jacob P.* (2007) 157 Cal.App.4th 819, 832-833.) In determining whether a section 388 petitioner has made the requisite showing, the juvenile court may consider the entire factual and procedural history of the case, including factors such as the seriousness of the reason leading to the child's removal, the reason the problem was not resolved, the passage of time since the child's removal, the relative strength of the bonds with the child, the nature of the change of circumstance, and the reason the change was not made sooner. (*In re Mickel O.* (2011) 197 Cal.App.4th 586, 616; *In re Aaliyah R.* (2006) 136 Cal.App.4th 437, 446-447; *In re Justice P.* (2004) 123 Cal.App.4th 181, 188-189.)

If the juvenile court has ruled the parent failed to carry her initial burden to demonstrate new evidence or changed circumstances, the first step of the analysis, the question for the reviewing court is whether that finding is erroneous as a matter of law. (See *Almanor Lakeside Villas Owners Assn. v. Carson* (2016) 246 Cal.App.4th 761, 769 [where the issue on appeal turns on a failure of proof at trial, "the question for the reviewing court [becomes] "'whether the evidence compels a finding in favor of the appellant as a matter of law'""]; *In re Aurora P.* (2015) 241 Cal.App.4th 1142, 1156 [same].) We review the court's best interest determination, the second step, for abuse of discretion and may disturb the exercise of that discretion only in the rare case when the court has made an arbitrary or irrational determination. (*In re Stephanie M.*, *supra*, 7 Cal.4th at p. 318.)

We do not inquire whether substantial evidence would have supported a different order, nor do we reweigh the evidence and substitute our judgment for that of the juvenile court. (*Ibid*.) We ask only whether the juvenile court abused its discretion with respect to the order it actually made. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1351.)

b. *The court did not abuse its discretion in finding visitation or conjoint counseling was not in Davlene's best interest*

Frances contends her evidence of 17 months of sobriety, participation in substance abuse programs, securing stable housing and finding employment compelled a finding of changed circumstances within the meaning of section 388, not merely "changing circumstances" as the juvenile court ruled. (See generally *In re Alayah J.* (2017) 9 Cal.App.5th 469, 482 [a parent seeking relief under section 388 must show changed, not changing, circumstances]; *In re Mickel O.*, *supra*, 197 Cal.App.4th at p. 615 ["the petitioner must show *changed,* not changing, circumstances"].) In support Frances cites *In re J.C.* (2014) 226 Cal.App.4th 503, in which the court found the mother's "long-term sobriety"—"over a year" (*id.* at p. 523)—and "renewed interest in parenting classes" established changed circumstances (*id*. at p. 526), as well as *In re Casey D.* (1999) 70 Cal.App.4th 38, 49, in which the juvenile court found the father's nine-month period of being drug free had established a change of circumstances.

While we might agree Frances demonstrated changed circumstances notwithstanding her lengthy history of drug abuse and the relative recency of her purported recovery from addiction (but see *In re Ernesto R.* (2014) 230 Cal.App.4th 219, 223 [to support a section 388 petition the purported change of

circumstances must be substantial; "[a]ppellant's completion of a drug program, at this late a date, though commendable, is not a substantial change of circumstances"]), the nature and extent of that recovery and whether it is adequate to address the child's overriding interest in permanency and stability is precisely the appropriate focus of the second prong of the section 388 analysis, the child's best interest. (See *In re J.C.*, *supra*, 226 Cal.App.4th at p. 527 [a parent's petition to reopen reunification efforts "must establish how such a change [of circumstances] will advance the child's need for permanency and stability"].) Here, there was extensive evidence that Davlene was thriving in Roxanne's care, and Davlene testified in compelling fashion not only that she feared being removed from Roxanne's home, where she was nurtured and loved, but also that she was highly resistant to having any interaction with Frances, with whom she had no preexisting relationship. (Cf. *In re Aaron R.* (2005) 130 Cal.App.4th 697, 706 [section 388 petition seeking placement of child properly denied where child was thriving in the home of prospective adoptive parent and there was no evidence of any ongoing, positive relationship between petitioner and child].)[4]

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[4] Frances's reliance on *In re Hunter S.* (2006) 142 Cal.App.4th 1497 is misplaced. In that case the finding the juvenile court had abused its discretion in denying the mother's section 388 petition seeking further reunification services was expressly based on the court's failure to enforce a previous visitation order. (*Id.* at p. 1508.) Here, in contrast, although the juvenile court had expressed its hope at several points in the proceedings that visitation could be ordered in the future, there was no failure to enforce a prior order for visitation or other reunification services.

Frances did not aver in her section 388 petition, let alone provide any evidence, that granting her request for visitation and/or conjoint therapy with Davlene as a prelude to returning the child to her custody, with its attendant delay in providing Davlene with permanency and stability, would be in Davlene's best interest. Nor does the record reflect any evidence to support such a finding.

Frances simply argued, given the likely termination of Rachelle's guardianship of Davlene, "[i]t is in the child's best interest to reestablish a relationship with her biological mother." If shared genetics alone were sufficient to satisfy the best-interests prong, however, no parent seeking modification of a court order under section 388 would need to show the proposed modification actually benefited the dependent child. Of course, there is no such parental exemption from that statutory mandate. (See *In re J.C., supra,* 226 Cal.App.4th at p. 527 ["In essence, Mother is asserting it is in J.C.'s best interests to preserve the biological parent-child relationship"; however, Mother's genetic relationship with J.C. alone was insufficient to demonstrate that modification of the court's order would promote the child's interest in permanency and stability]; see generally *In re Marilyn H.* (1993) 5 Cal.4th 295, 309-310 [following termination of reunification services and the setting of a section 366.26 hearing, the parent's interest in reunification must yield to the child's best interest in permanency and stability; "[c]hildhood does not wait for the parent to become adequate"].)

On this record the juvenile court did not abuse it discretion in denying Frances's section 388 petition. (See *In re Mickel O.*, *supra*, 197 Cal.App.4th at p. 614.)

2. *The Juvenile Court Did Not Violate Due Process by Terminating Frances's Parental Rights to Davlene Without a Properly Supported Finding of Detriment to the Child*

Parents have a fundamental interest, protected by the due process clause of the Fourteenth Amendment, in the care, companionship and custody of their children. (*Santosky v. Kramer* (1982) 455 U.S. 745, 748 [102 S.Ct. 1388, 71 L.Ed.2d 599].) Accordingly, "the equivalent of a finding of unfitness . . . is necessary at some point in [dependency] proceedings as a matter of due process before parental rights may be terminated." (*In re Jasmon O.*, *supra*, 8 Cal.4th at p. 423; accord, *Guardianship of Ann S.* (2009) 45 Cal.4th 1110, 1135; see also *Santosky*, at pp. 747-748 [due process clause requires a state to support its allegations by clear and convincing evidence before it may irrevocably sever the rights of parents to their natural child].) However, that finding need not be made at the point when parental rights are terminated: "In a dependency proceeding, due process is satisfied if unfitness is established at an earlier stage, and parental rights terminated later based on the child's best interest." (*Guardianship of Ann S.*, at p. 1134; see *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 256.)

A finding of detriment to the child if care and custody were returned to the parent corresponds to a finding of parental unfitness and is sufficient to support an order terminating parental rights: "'California's dependency scheme no longer uses the term "parental unfitness," but instead requires the juvenile court make a finding that awarding custody of a dependent child to a parent would be detrimental to the child.'" (*In re Frank R.* (2011) 192 Cal.App.4th 532, 537; accord, *In re D.H.* (2017)

14 Cal.App.5th 719, 731; *In re P.A.* (2007) 155 Cal.App.4th 1197, 1212.)

Frances argues the juvenile court's order terminating her parental rights to Davlene violated due process because no detriment finding had been made prior to the section 366.26 hearing and the evidence before the court at that hearing did not support a current finding of parental unfitness. Frances's challenge to the juvenile court's termination order lacks merit.

At the section 366.26 hearing on June 26, 2018 the juvenile court expressly found, by clear and convincing evidence, that returning Davlene to Frances's custody would be detrimental to the child, the finding required to support an order terminating parental rights. (*In re D.H.*, *supra*, 14 Cal.App.5th at p. 730 [court may not terminate nonoffending parent's parental rights without finding by clear and convincing evidence that awarding custody to the parent would be detrimental to the child]; *In re T.G.* (2013) 215 Cal.App.4th 1, 20 [same].)[5] Substantial evidence supports this finding. (See *Sheila S. v. Superior Court* (2000)

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[5] As discussed, throughout the proceedings the juvenile court denied Frances's requests for visitation with Davlene, expressly finding visitation, even if monitored, would be detrimental to the child. As this court explained in *In re C.C.* (2009) 172 Cal.App.4th 1481, 1490, in evaluating an order denying a parent's request for visitation, "the risk of detriment must be *substantial*, such that returning a child to parental custody represents some danger to the child's physical or emotional well-being." Nonetheless, Frances is correct that it cannot be determined from transcripts of the proceedings whether the court applied a clear-and-convincing standard of proof in making these detriment findings, as required to support an order terminating parental rights.

84 Cal.App.4th 872, 880-881 ["'[t]he sufficiency of evidence to establish a given fact, where the law requires proof of the fact to be clear and convincing, is primarily a question for the trial court to determine, and if there is substantial evidence to support its conclusion, the determination is not open to review on appeal'"]; accord, *In re Quentin H.* (2014) 230 Cal.App.4th 608, 613.)

As the court explained, at the time the section 300 petition concerning Davlene was filed in 2016, Frances had not complied with the juvenile court's order to complete a substance abuse program that had been entered in the dependency proceedings for Davlene's younger brother, and by July 2016, when the jurisdiction hearing was initially held, Frances was again incarcerated on drug charges. A finding it would be detrimental to return Davlene to Frances's custody could have been made at the disposition hearing in September 2016, the court continued, but was unnecessary because Davlene was removed from her legal guardian, not Frances. Notwithstanding Frances's commendable efforts thereafter to achieve and maintain her sobriety, in light of her extensive history of drug abuse and criminal behavior, together with evidence, presented by Frances with her section 388 petition, that she had not progressed past step two in her 12-step program, the record reasonably supports the court's conclusion her current, positive lifestyle was a work-in-progress and her substance abuse issues were not fully resolved.

In addition, based on Davlene's testimony, which the court found credible and persuasive, and the evidence there was no meaningful relationship between Frances and Davlene, the record before the court supported a finding that disrupting Davlene's relationship with Roxanne, with whom Davlene had

lived for most of her life and who offered her permanency and stability, would be detrimental to the child. (Cf. *In re Stephanie M.*, *supra*, 7 Cal.4th at p. 317 [if the parent is not receiving reunification services, the focus of dependency proceedings is the child's need for permanency and stability].) Nothing more is required to affirm the juvenile court's order.

DISPOSITION

The juvenile court's May 1, 2018 order denying Frances's section 388 petition and its June 26, 2018 order terminating parental rights are affirmed.

PERLUSS, P. J.

We concur:

SEGAL, J.

FEUER, J.